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PUNISHING THOUGHT: A NARRATIVE DECONSTRUCTING THE INTERPRETIVE DANCE OF HATE CRIME LEGISLATION

ANNE B. RYAN*

INTRODUCTION

We don't see things as they are, we see things as we are.

-Anaïs Nin¹

The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'

-Justice Hugo L. Black²

History is comprised of narratives which suggest how we have become who we are. We also learn from hindsight, and try to make ourselves and our world a better place by learning from our mistakes and correcting past injustices.³ But history, like any other story, is inherently subjective. Some argue that our present reality is similarly subjective because it is a narration woven from imprecise language through individual perceptions.⁴

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1. Anaïs Nin, in *QUOTABLE WOMEN: A COLLECTION OF SHARED THOUGHTS*, (Running Press, 1989).

2. *Beauharnais v. Illinois*, 343 U.S. 250, 274 (1952).

3. See, e.g., Benjamin N. Cardozo in *THE GREAT LEGAL PHILOSOPHERS* 511, 520 (Clarence Morris ed., Univ. of Penn. Press, 1959) (noting that judges decide which laws should be extended or restricted by evaluating, in part, social welfare and public policy).

4. See, e.g., Kim Lane Scheppele, *Legal Storytelling: Foreword: Telling Stories*, 87 *MICH. L. REV.* 2073, 2090 (1989) (considering the effect language has on determining the validity of the perceptions of events that humans experience on a day-to-day basis and construe as real life, if there is such a thing). Scheppele states,

[b]ut how does one know truth when one finds it? Truth isn't a property of an event itself; truth is a property of an *account* of an event. As such,

The challenge to maintain our jurisprudential integrity compels us to ensure that current legislation and legal decisions fit within the framework of our nation's Constitution. This task is not always an easy one. The interpretation of past decisions and statutory regulations is really an interpretation of human decisions made by human perception and expressed through human language. There is an intrinsic subjectivity in this analysis which one cannot adequately resolve without using some of the tools that civilized people have cultivated to explore these queries, philosophy and psychology.

Part I of this Comment enters the arena of hate crime legislation by discussing three pivotal decisions rendered by the United States Supreme Court. In doing so, Part I will introduce the reader to the First Amendment issues at stake and the interpretive dilemmas which are inherently a part of hate (or bias) crime statutes.⁵ Part II will explore the implications of hate crime

it has to be perceived and processed by someone, or else it couldn't be framed in language to count as an account at all.

Id.

See also Joel R. Cornwell, *The Confusion of Causes and Reasons in Forensic Psychology: Deconstructing Mens Rea and Other Mental Events*, 33 U. RICH. L. REV. 107, 111 (1999) (recognizing that language is imprecise and cannot be considered absolute truth or the representation of an absolute truth). Rather, language is a tool that we use to give meaning to the perceptions and experiences of our lives without pausing to realize that this tool that we use is, in and of itself, a circular and redundant perplexity. *Id.* Cornwell explains this by stating,

[t]he delimitations of logic confine language to varying degrees of imprecision. In order to eliminate all traces of ambiguity, language would need validation from something outside itself, some superior form of thought free from any form of signification. But without some form of signification there can be no language, and without language, there can be no thought.

Id.

5. The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Regarding the interpretive dilemma, one must consider the difference between punishing intent, a classic mens rea analysis, and punishing thought or speech, which is protected by the First Amendment. See generally Abby Mueller, Comment, *Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation*, 61 UMKC L. REV. 619, 625-26 (1993) (recognizing the necessity of determining if the legislation punishes thought, which has been determined to be unconstitutional, and the questions necessarily raised in order to distinguish between motive and thought). For additional insights on the distinction between thought and motive and their relation to the discussion at hand, see also Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U.L. REV. 1015, 1017-19 (1997).

legislation through the narrative perspective in psychology.⁶ This branch of psychology, and its relation to legal discourse regarding hate crime legislation, demonstrates how people see and explain the world.⁷ Such a world vision is subjective.⁸ Part III follows with an investigation into philosophical reasoning, focusing on the inefficiency and arbitrary nature of words and language, particularly through the insight offered by deconstructionists.⁹ Because words lack universal meaning, the stories told in the courtroom are even less reliable.¹⁰ Finally, Part IV proposes that hate crime legislation, albeit grounded in good intent, is unconstitutional.

The United States Supreme Court's recent mandate of a jury determination beyond a reasonable doubt for enhancement statutes¹¹ renders assessment of bias crimes a theoretically impossible task for our legal system to contemplate. Therefore, despite the valuable desire to rid our national conscience of bias-related wrongs by punishing the wrongdoer, we shall have to abandon legislation that differentiates between offenders and undermines our constitutional system, and return to more traditional approaches of punishment.

I. SETTING THE STAGE

Indecencies directed toward African-Americans¹², women¹³,

6. See Jan M. Van Dunne, *Narrative Coherence and Its Function in Judicial Decision Making and Legislation*, 44 AM. J. COMP. L. 463, 464-65 (1996) (giving the historical root of the term and pointing out that the concept has been adopted and integrated in to a myriad of fields, including law, literary criticism, history and ethics, as well as psychology). See generally GEORGE S. HOWARD, *A TALE OF TWO STORIES: EXCURSIONS INTO A NARRATIVE APPROACH TO PSYCHOLOGY* (Academic Publications, 1989).

7. See generally HOWARD, *supra* note 6.

8. *Id.*

9. See generally Benjamin Graves, *Deconstructionism*, at <http://landow.stg.brown.edu/post/poldiscourse/spivak/deconstructionism.html> (last visited Nov. 7, 2000) (defining deconstructionism); Jack M. Balkin, *Deconstruction's Legal Career*, copyright 1998 by J.M. Balkin, at <http://yale.edu/lawweb/jbalkin/articles/deccar1.htm> (1998) (discussing historical changes that deconstructionism went through from literature to philosophy to law); Jack M. Balkin, *Being Just with Deconstruction*, edited version in 3 SOCIAL AND LEGAL STUDIES 393 (1994), at <http://www.yale.edu/lawweb/jbalkin/articles/beingjust1.htm> (1994-99) (applying deconstructionism to questions of law and justice). See also Joel R. Cornwell, *Legal Writing as a Kind of Philosophy*, 48 MERCER L. REV. 1091 (1997) (presenting an interesting perspective on legal writing and how it is taught in today's law schools from a deconstructionist philosophical perspective).

10. See Cornwell, *supra* note 4, at 129 (identifying a defendant's intent as "a subjective pattern of appropriating a person's very humanity").

11. *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000).

12. See, e.g., PETER JENNINGS & TODD BREWSTER, *THE CENTURY*, 33-42,

Jews¹⁴, people of Middle-Eastern descent¹⁵, and many other ethnic groups¹⁶ have plagued our nation since its inception. As our collective conscience matures, our country strives to ensure that the “land of liberty” is not a misnomer. Hate crime legislation was intended to address such problems, but has fallen short of its mark and threatens the very liberties that our nation holds so dear.

Hate crimes are defined as “criminal acts committed against particular victims because of the assailant’s perception of the victim’s race, national origin, religion, or other bias-motivated classification.”¹⁷ A vast majority of states have enacted legislation to punish bias-motivated crimes.¹⁸ Many of these legislative acts were based on the Anti-Defamation League’s model¹⁹, which operates to “enhance” a pre-existing criminal conviction and sentence.²⁰ The United States Supreme Court has now decreed that enhancement statutes which originally allowed a judge at sentencing to increase penalties for a factor not determined as an element at trial (other than recidivism) are unconstitutional.²¹ When enacting and enforcing hate crime legislation, some states used an alternative method, the “separate crime ethnic intimidation statute.”²² This type of legislation seeks to address hate crimes as separate offenses, where the concept of “hate” is an element of the crime²³; as distinguished from the enhancement

348-56 (1998) (narrating on the racial oppression of African Americans in the United States in the early part of the twentieth century, as well as commentary on the struggle for desegregation). See also *Eugene, Oregon NAACP*, at <http://www.efn.org/~naacp/> (last visited Oct. 13, 2000).

13. See, e.g., *The 9 to 5 National Association of Working Women*, at <http://www.9to5naww.pgg.com> (last visited Oct. 13, 2000) (offering services and information to women coping with harassment and discrimination).

14. See, e.g., *The American Association for Affirmative Action*, at <http://www.affirmativeaction.org> (last visited Oct. 13, 2000) (fighting to end discrimination against people of Jewish ancestry and promoting affirmative action for all minority groups).

15. See, e.g., *The Iranian American Anti-Discrimination Council*, at <http://www.antidiscrimination.org> (last visited Oct. 13, 2000) (promoting the interests of Americans of Iranian and Persian descent and discouraging discrimination on the basis of middle-eastern ancestry).

16. See generally *The National Council of La Raza*, at <http://www.nclr.org> (last visited Oct. 13, 2000) (created for and by Hispanic Americans); *Chinese for Affirmative Action*, at <http://www.caasf.org> (last visited Oct. 13, 2000) (setting forth a goal to eliminate social conditions fostering bigotry and discrimination against Asian Americans).

17. Rosemarie A. Micacci, Comment, *Wisconsin v. Mitchell: Punishable Conduct v. Punishable Thought*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 131, 133 (1995).

18. Mueller, *supra* note 5, at 620.

19. *Id.*; Micacci, *supra* note 17, at 135 n30.

20. Micacci, *supra* note 17, at 133.

21. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

22. Micacci, *supra* note 17, at 134.

23. *Id.*

statutes, where the criminal offense is already established and the "hate" allows for increased penalties to be assessed.²⁴ For the purpose of this Comment, references to bias crime legislation refer to those states that have traditionally used enhancement statutes which allow the judge to increase the penalty above the statutory maximum set for the base crime. Under the new rule, states will be forced to adopt a system where bias is an element of the offense, and can sustain the same burden of proof as any other element.²⁵

The line has been drawn in the sands of hate crime legislation, with legal scholars and commentators taking their positions on either side.²⁶ There are a number of different arguments against hate crime legislation, including a statement by Doran Peters, the Managing Editor of the American Journal of Criminal Law, that "sound policies have been overwhelmed with the rhetoric of political correctness."²⁷ Professor James Weinstein posits that enhanced penalties for hate crimes are merely a "part of a larger American syndrome of adopting harsh punishment as an expedient response that deals only with the most superficial manifestations of complex deep-seated problems."²⁸ Some commentators, such as Anthony Dillof, J.D., L.L.M., focus on morality and a general right of all people to be free of wrongdoing; those infringing on such rights deserve equal punishment regardless of the victim's status.²⁹ Judge Abrahamson, one of the dissenters in the *Wisconsin v. Mitchell* case, acknowledged a

24. *Id.*

25. *Apprendi*, 530 U.S. 466, 490.

26. *See, e.g.*, Dillof, *supra* note 5 (examining bias crimes in light of liberalism and determining that bias crimes, when viewed from this perspective, do not stand on solid ground); Steven G. Gey, *What if Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014 (1997) (arguing that despite the ruling upholding the constitutionality of the statute in *Mitchell*, the statute was unconstitutional in light of the First Amendment); *but see* Shirley S. Abrahamson et al., *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L.J. 515 (1994) (discussing her personal feelings regarding the case as a presiding judge, and giving information and perspectives representing both sides of the story); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739 (1999) (surveying and responding to critics of hate crime legislation, Taslitz surmises that these types of legislation are socially justified and important to the moral character of our nation as a manner of combating racism).

27. Doran D. Peters, *Revealing the True Nature of the Hate Crime Movement*, 26 AM. J. CRIM. L. 387 (1999).

28. Abrahamson, *supra* note 26, at 525 n37 (quoting James B. Weinstein from his article *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?* CRIM. JUST. ETHICS, 55, 60 (1992)).

29. Dillof, *supra* note 5, at 1034 (reasoning that both offenders have the same degree of culpability regarding the intent of the crime committed and thus deserve the same degree of punishment).

disturbing observation made in the NEW YORKER that "hate crime statutes may be disproportionately enforced against minority group members."³⁰

The First Amendment of the Constitution of the United States³¹ not only protects freedom of speech, but according to popular interpretation, also safeguards the freedom individuals enjoy regarding their thoughts.³² Each person's thoughts are protected as a fundamental right, even if such thoughts offend another.³³ There are, however, some exceptions to the right to free speech and thought.³⁴ For the purpose of this analysis, the exception of "fighting words" is relevant.³⁵ The content of the "fighting words" is incidental.³⁶ The essential analysis of "fighting words" revolves around the notion of "a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."³⁷ Stated another way, "the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication."³⁸ For example, an ordinance may prohibit obscenity generally, but not on the basis of content directed at one group and not another.³⁹ This distinction means that a municipality could forbid certain unacceptable modes of speech (for example, speech that incites violence), but based upon the effects of the speech, not the racial content.⁴⁰

In 1992, the United States Supreme Court analyzed a city ordinance which targeted bias-motivated crime and found that the

30. Abrahamson, *supra* note 26, at 525-26.

31. U.S. CONST. amend. I.

32. Mueller, *supra* note 5, at 624 ("Although there are many divergent interpretations of the amendment, the most recent rulings have interpreted it to protect speech and thought, regardless of how offensive it may be, and to protect symbolic speech as expressive conduct.").

33. *Id.*

34. *Id.* at 624-25 ("[T]here are some exceptions to the protection of speech. 'Fighting words' can be regulated, as can expressive conduct where there is an important governmental interest, and the regulation is narrowly tailored to address it."). For a comprehensive explanation of constitutionally proscribed speech, see *R.A.V. v. St. Paul, Minnesota*, 505 U.S. 377 (1992) (resting the decision on the court's analysis of proscribed speech and when it is or is not a constitutionally valid claim).

35. Mueller, *supra* note 5, at 624-25.

36. *R.A.V.*, 505 U.S. 377 at 393.

37. *Id.*

38. *Id.* at 386.

39. *Id.* at 384 (giving the example that the court's point is that "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government").

40. *Id.* at 385 (using an example that a city could punish one for burning a flag if there was a city ordinance against outdoor fires, but could not pass an ordinance prohibiting dishonoring the flag).

ordinance was unconstitutional in *R.A.V. v. St. Paul*.⁴¹ The Court held that the ordinance was unconstitutional because it prohibited speech based solely upon the subject matter.⁴² The Court reasoned that the First Amendment expressly forbids a law that discriminates against a person's viewpoint, rather than focusing only upon the content of the "fighting words."⁴³ The Court noted that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed."⁴⁴

The following year, the United States Supreme Court settled another dispute regarding a hate crime statute in *Wisconsin v. Mitchell*.⁴⁵ The United States Supreme Court heard the case after

41. *R.A.V.*, 505 U.S. 377 (The charges against R.A.V., a teenage male, were in response to his allegedly burning a cross in the front yard of a home owned by an African American family). The Court eloquently summed up its holding with the following: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V.*, 505 U.S. 377 at 396. The ordinance in question read,

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380.

42. *Id.* at 381.

43. *Id.*

44. *Id.* at 382.

45. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). Mitchell was convicted of aggravated battery and his sentence was enhanced due to a finding that he chose his victim based on the boy's race. *Id.* at 479. Mitchell told other African American men, who were stimulated after having watched the film "Mississippi Burning," to "go get" a white male passerby if they wanted to "fuck somebody up." *Id.* at 480. The penalty enhancement statute in question at the time of the trial was as follows:

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(2)

(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is

the Wisconsin Supreme Court ruled that the statute was in violation of the First Amendment of the Constitution because it punished offensive thought.⁴⁶ The Wisconsin Supreme Court further opined that the statute was bound to have a chilling effect because, in all likelihood, prior speech might prove the bias.⁴⁷ The United States Supreme Court evaluated Wisconsin's enhancement statute and ruled that, in reviewing the sentence to be imposed, judges may factor in "[t]he defendant's motive for committing the offense."⁴⁸ The Court contrasted that "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge."⁴⁹ By comparing the motives defined under the Wisconsin statute with those defined in anti-discrimination laws⁵⁰, the Court held that the First Amendment allows the evidentiary use of speech to establish an element of a crime, or the requisite intent or motive, and therefore the statute was constitutional.⁵¹

The most recent United States Supreme Court decision concerning a hate crime legislative act came in June of 2000, *Apprendi v. New Jersey*.⁵² In *Apprendi*, the Supreme Court's

\$10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than \$5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction of that crime.

Id. at 481 n1.

46. Abrahamson, *supra* note 26, at 523.

47. *Id.*

48. *Mitchell*, 508 U.S. 476 at 485.

49. *Id.*

50. *Id.* at 487 (giving as an example Title VII of the Civil Rights Act of 1964, and pointing out that this act "makes it unlawful for an employer to discriminate against an employee 'because of such individual's race, color, religion, sex, or national origin'").

51. *Id.* at 489.

52. *Apprendi v. New Jersey*, 530 U.S. 466, 488-90 (2000) (pointing out that the decision made that it is unconstitutional to allow sentencing enhancements for any issue other than recidivism to be determined by a judge with the standard of review set at "preponderance of the evidence," did not focus on the constitutional standing of basing an enhancement on racial bias). However, the result of the new rule was that the Hate Crime Act in New Jersey was rendered unconstitutional, and that "hate" would now have to be decided by a jury beyond a reasonable doubt. *Id.* So, although the Court stayed away from making an express ruling on the constitutionality of bias crime legislative acts, the implication is clear. The act that *Apprendi* committed involved firing a gun into the home of an African American family

narrow decision rested in the determination of whether sentencing enhancements that increased the maximum sentence for the accused required a factual determination beyond a reasonable doubt.⁵³ The Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁵⁴ Essentially, this means that the hate or bias must be an element of the crime, rather than a factor to be determined by a judge at sentencing, if it would increase the maximum penalty.⁵⁵ The Supreme Court’s verdict in *Apprendi* thus makes it more difficult for states to punish those allegedly motivated by bias in the commission of a crime.⁵⁶

These varied and seemingly inconsistent decisions rendered over the years by our highest judicial body may be due to the Court’s hesitancy to punish thought. The reluctance to punish thought has led to the strict standard that is a result of the *Apprendi* rule.⁵⁷ Lessons taught by philosophy and psychology regarding linguistics and perception aid in understanding the inherent problems of bias crime ordinances. One main dilemma is the implied or explicit “because of” extrapolation on the intent

that had recently moved into the neighborhood with the purpose “to intimidate.” *Id.* at 491.

53. *Id.* at 469 (framing the question presented as a due process issue rather than First Amendment since the narrow issue focused around sentencing enhancements rather than the broader, and arguably more difficult, First Amendment claim which would have arisen under hate crime legislation).

54. *Id.* at 490 (stating, “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”).

55. *Id.* at 490. See also Erwin Chemerinsky, *Law Enforcement and Criminal Law Decisions*, 28 PEPP. L. REV. 517, 521 (2001) (noting that the hate-based motive is essentially a distinct crime and thus must also be proven beyond a reasonable doubt). Chemerinsky posits that although a literal reading of the text obviates that the *Apprendi* standard be applied when the maximum penalty is increased, he believes the rationale behind the holding would support the standard’s application to enhancement within the statutory range of the base crime. *Id.* at 521-22. The aforementioned rationale behind the *Apprendi* Court’s holding is “that it is wrong to convict a person of one crime and impose punishment for another.” *Id.* at 522.

56. *Apprendi*, 530 U.S. 466 at 490-91 n16 (quoting *Patterson v. New York* (432 U.S. at 228-229 n. 14) and asserting that “the political check on potentially harsh legislative action is then more likely to operate”). Apparently, this dictum is the Court’s way of letting the reader know that the Court finds hate crime legislation “harsh,” probably because of its propensity to punish thought. Although the issue was not brought to the Court to review the hate crime legislation itself, and the Court was merely asked for a review on the sentence enhancement problem, *id.* at 473, one could speculate that the United States Supreme Court, in this statement, is wary of this type of legislation.

57. *Id.* at 490.

aspect of the crime, which is significantly different than the “because of” consideration necessary in the determination of a Title VII discrimination charge.⁵⁸ The hate crime “because of” asks “why?” whereas the Title VII “because of” asks “what?”⁵⁹ This fact then becomes a part of the new predicament that *Apprendi* brings, the perceptual pitfalls of “beyond [a] reasonable doubt.”⁶⁰

II. LET THE DANCE BEGIN

In analyzing hate crime legislation and its role in American jurisprudence, one must consider the constitutional rights of all citizens along with legislation’s affirmation or neglect of these rights. Hate crime legislation must be grounded on an establishment that the criminal was motivated by racial animus, not that the accused had bigoted and hateful thoughts.⁶¹ Otherwise, the legislation would act to punish criminals who happen to be racists, an idea repugnant to the rights established

58. See Gey, *supra* note 26, at 1039-40. Title VII prohibits employers from discriminating in the hiring practice “because of” someone’s race or other protected class. *Id.* at 1039. In this regard, the state is permitted to regulate conduct; the distinguishing factor is that the employer cannot discriminate based upon race versus a different, non-protected classification. *Id.* The intent is to explain what the employer did, not his motivation for doing it. *Id.* In contrast, the “because of” which is intrinsic to the hate crime legislation passed in this nation refers to the “why” of the matter. *Id.* at 1039-40. Gey sums this concept up nicely in regard to the *Mitchell* case by observing,

In *Mitchell*’s case, the beating is the ultimate act that the state has authority to prevent. The words “because of” in the Wisconsin enhancement statute are irrelevant to the determination of whether this ultimate act has indeed occurred. . . . The “because of” language refers only to a subjective reality (i.e., Why did he do it?) rather than, as in the Title VII, to an objective reality (i.e., What did he do?). . . Under the Wisconsin scheme, the term “because of” refers purely to *Mitchell*’s thoughts and expression about his crime.

Id.

See also Dillof, *supra* note 5, at 1033 (noting that the “because of” feature of hate crime definitions sets them apart from other types of crimes because of the modification on the intent aspect of the crime’s elements).

59. *Id.*

60. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

61. See Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2116 (1994) (pointing out the “[c]ovariant [r]elationship [b]etween [c]rime and [a]nimus”). Candeub distinguishes between the requisite intent for a crime such as an assault and an assault based upon racial animus. *Id.* at 2115. People can grasp the mens rea necessary for an offense such as an assault based upon childhood fights and adult observations and conclusions (such as the conclusion that one probably intends to cause bodily injury to another by bludgeoning him with a brick). *Id.* The jury is able to analogize the requisite mens rea from personal experience and observation. *Id.* Analogy does not serve the same purpose in the hate crime arena. *Id.* at 2116. Few people understand what it is like to base one’s actions solely on racial hatred so it is hard to accurately perceive the mental state of one who does. *Id.*

by the First Amendment to the Constitution of the United States.⁶² The viewpoint of the accused must be factored out, and the focus remain entirely on the act itself.⁶³ The inherent problem in this type of legislative act lies in the results attained: the side-stepping of constitutional rights through a complex perceptive and semantic dance.⁶⁴ In analyzing hate crimes through this metaphor, one must first consider narrative perplexities regarding the punishment of crimes based upon bias against the limitations and guidelines of our judicial system based on the tenets of the Constitution.

A. *The Psychological Tango into Narration*

The importance and legitimacy of studying the effects of narration began in other fields, such as psychology, and made their way into the legal forum.⁶⁵ Scholars in all fields who embrace the narrative perspective contemplate the function and reasoning behind a person's story; its plot and structure.⁶⁶ Ultimately,

62. *Id.*

63. *Id.*

64. *Id.* Candeub states:

This distinction is essential; without it the laws would penalize thoughts. The problem is that such a separation is difficult, to say the least, and considering the other minds problem, it may often be impossible. How can one distinguish between, on one hand, the racist who happens to assault people and expressed himself as a racist before an attack and, on the other hand, a racist whose attack was actually motivated by racial animus? Far from being academic, this distinction keeps hate crimes from being thought crimes. Moreover, whenever courts make mistakes because of their essentially limited ability to infer mental states (and because of the unverifiable nature of intents, no one will ever be able to tell if mistakes have been made), then hate crimes will be thought crimes.

Id.

65. Van Dunne, *supra* note 6, at 463 (acknowledging that the study of the role of storytelling, or narration, developed in several fields, including philosophy, literature and history). Narrative psychology, or the storytelling perspective, has the same roots and is well established in the field of cognitive psychology. See generally HOWARD, *supra* note 6. For more information of a general nature concerning the realm of legal storytelling, see, e.g., Scheppele, *supra* note 4 (introducing a journal dedicated to legal storytelling and its impact on the subjective versus objective view of truth); Norman J. Finkel, *Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction*, 74 NEB. L. REV. 742 (1995) (using traditional stories and portraying the heroes as defendants to explore the "heat of passion" distinction between murder and manslaughter with the analysis based on psychological perspectives); Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543 (1988) (looking at the nature of legal storytelling from the perspective of philosophical rhetoric).

66. Van Dunne, *supra* note 6, at 464. Van Dunne credits the development of the study of narration to the philosophers Ricoeur and Arendt. *Id.* See also PETER BROOKS, *PSYCHO-ANALYSIS AND STORYTELLING* 57 (Michael Payne &

narrators believe that the way people view their world, their interactions with others, and attempts to place a meaning upon these people and events is akin to “storytelling.”⁶⁷

This perspective has obvious implications in the world of legal courtrooms.⁶⁸ Cases are won or lost based upon perceptions of truth.⁶⁹ Our criminal justice system is premised on the theory that individuals are innocent until proven guilty. The term proof implies objectivity.⁷⁰ However, the addition of the “because of” statement, asking “why” as opposed to “what,” in hate crime legislation and prosecution brings the burden of proof into the subjective arena.

Many individuals make up the courtroom dance in a criminal trial. The victim and accused, their attorneys, the judge and the jury all have roles.⁷¹ Each of these members brings his or her own

Harold Schwier cds., Blackwell Publishers 1994) (asserting that psychoanalytical construction acts as a bases for narrativism and discerning its meaning). As is true in any dialogue, there is both collaboration between speaker and listener to fashioning a clear text and struggle over its interpretation and the form of the final product. *Id.* This is common in a psychoanalytical scheme. *Id.*

67. Finkel, *supra* note 65, at 776 (explaining that the way individuals interpret their own lives is through the telling of the story of their lives, their personal narrative plots). George Howard, a psychologist involved in the development of narrative psychology, is cited as explaining psychotherapy from a narrative perspective. “[T]herapy usually begins with an invitation to the client to tell his or her story[.] From this ‘constructive’ view, ‘life’ becomes the ‘stories we live by,’ ‘psychopathology’ becomes ‘stories gone mad,’ and ‘psychotherapy’ becomes ‘exercises in story repair.’” *Id.*

68. Scheppele, *supra* note 4, at 2075 (“Stories carry power because they have the ability to convey truths even if the stories themselves are not the only ways of seeing the world. Stories re-present experience, and can introduce imagination and new points of view.”).

69. Finkel, *supra* note 65, at 776 (asserting “real” and “stories” may not be reconcilable concepts). Finkel points out that some social constructionists posit that truth as an objective reality does not exist — there are only stories. *Id.* See also Scheppele, *supra* note 4, at 2082 (acknowledging that stories may not be different based on an objective truth countered with an objective falsity). Rather, stories are propositions asserted to be true by two different individuals who hold different points of view derived from differing backgrounds and experiential bases. *Id.*

70. Scheppele, *supra* note 4, at 2088-89 (considering the objectivist theory of truth, which promotes the belief that there is a “single neutral description of each event which has a privileged position over all other accounts”). This neutral “truth” is seen to be “really true” because it allegedly is without point-of-view, so it tells what really happened rather than what an observer or participant thought to have happened. *Id.* at 2089-90. But the “neutral observer’s” viewpoint is just that, a viewpoint, and is no more truthful than any other point of view, despite being a construct rather than a story, for that construct is merely the story of what is thought to be true rather than any objective truth. *Id.* at 2090-91.

71. *Id.* at 2085 (claiming that “legal storytelling is no less patterned than other sorts of storytelling; indeed, it may be even more structured because it is

perceptions with him or her into the drama.⁷² Backgrounds, upbringings, cultural and socio-economic features color individual points of view. The colors on our palettes are well established before the trial unfurls.

The traditional and current role of the jury is that of fact-finder. The *Apprendi* decision governs enhancement statutes — now “hate” must be considered as an element and sustains the same burden of proof as all elements.⁷³ Theoretically, in a bias-crime situation, the jury must not only find that the base crime occurred,⁷⁴ but also determine that at the moment of the commission of the crime, hate was a motivating factor.⁷⁵ This is distinguishable from simply having a background of hateful thoughts and statements regarding the victim’s protected class.⁷⁶ A finding based on previous thoughts and vocalizations has clear protection by the First Amendment.⁷⁷ In the current paradigm, a jury is charged with finding that at the moment the crime was committed, the motivating factor was that of the requisite bias.⁷⁸

There are a number of stories told in the courtroom⁷⁹ — the

embedded in a larger institutional framework that routinizes solutions to unusual events and that values regularity and predictability”).

72. See generally Van Dunne, *supra* note 6, at 474 (recognizing the role that American feminists and critical race theorist legal commentators have had on the use of narrativism in law. Stories by women and people of color are the focus of these scholars and less concern is placed on their accuracy than their aesthetic and emotional dimensions); Scheppele, *supra* note 4, at 2096 (contrasting the neutral story with the stories told by “outsiders” — those typically or traditionally oppressed — who have different historical perspectives, thus their narrations take on different forms).

73. *Apprendi v. New Jersey*, 530 U.S. 466, 455 (2000).

74. *Id.* at 457.

75. *Id.*; see also Finkel, *supra* note 65, at 778 (positing that jurors try to explain the information presented to them by inferring both causal and intentional links among facts). This results in varied interpretations, all with a narrative vein, rendering them both interpretive and subjective. *Id.*

76. Finkel, *supra* note 65, at 776-77. Prior perceptions can wreak havoc in the jurors’ courtroom, as they are unable to leave these extralegal factors outside the forum. *Id.* Juror’s prior perceptions include specific beliefs about crimes and criminals, and people they perceive as being bigoted or hateful. *Id.* “And while these prototypes may be powerfully determinative of jurors’ verdicts, they are likely to be distorted caricatures. . . .” *Id.* at 777. See also *Apprendi*, 530 U.S. 466 at 475 (stating in dictum, “we reject the suggestion by the State Supreme Court that ‘there is rarely any doubt’ concerning the existence of the biased purpose”).

77. Mueller, *supra* note 5, at 624.

78. Jurors’ emotions and the relation thereof as interpreted through different theories of cognition should be noted at this point. See generally Finkel, *supra* note 65, at 768-72. One theory of cognition promotes that thought that comes unconsciously and automatically can be fixed. *Id.* at 770. Therefore, jurors’ emotions at hearing certain stories in the courtroom can lead, according to some theorists, to an inability to interrupt the emotive process and interject reason or restraint. *Id.* at 769.

79. Scheppele, *supra* note 4, at 2082-83 (positing in law, all we have is a

victim's, the accused's, and the tales woven by attorneys representing both parties. Factoring these stories in with the rules of evidence and procedure guiding the judge to allow or disallow certain story-telling methods⁸⁰, the "facts" are indistinguishable from the illusory constructs subconsciously projected on the parties by the members of the jury.⁸¹ Narrative psychology, and its interpretation by legal scholars, shows us the danger of this course of jurisprudence. The subjectivity in the story told can prove to be outcome-determinative, regardless of the "truth" or "fiction" of the story.⁸² Intrinsic to the application of subjective analysis by the finders of fact, these "perceptual fault lines" leave us on shaky ground.⁸³

Analyzing hate crime legislation through the wisdom of scholars of narrative psychology and legal thought presents an unsavory picture. It is a picture of a conglomeration of many stories told from many perspectives that are then left to the jury to discover the "truth" of what really occurred beyond a reasonable doubt.⁸⁴ One could hypothesize that this analysis alone is enough to warrant the conclusion that the due process and freedom of speech and thought guaranteed by the United States Constitution should intervene against hate crime legislation.⁸⁵ Unfortunately, the picture is far from complete.

B. Philosophy and the Linguistic Two-Step

The field of philosophy brings us to another hurdle in the examination of hate crime legislation. The story-telling

story; judges and jurors are not witnesses to events, they are witnesses to storytellers).

80. See, e.g., Van Dunne, *supra* note 6, at 468 (expressing fascination in the role of judge and how his or her personality influences the role he or she plays and, moreover, the entire movement of the trial).

81. Finkel, *supra* note 65, at 776 (asserting that we place upon the jury the burden of finding out the truth, even if this demand is beyond the perceptive capacity of the jurors).

82. See Abrahamson, *supra* note 26, at 532 (acknowledging the inherent flexibility and subjectivity in the law, Justice Abrahamson opined that "[t]he law is not rigid. An issue can be stated in many ways and the way the issue is phrased often determines the answer.").

83. The term "perceptual fault lines" is coined by Scheppele, *supra* note 4, at 2082. She points out that even apparently stable communities which appear to be in congruence regarding general governing rules are composed of people coming from different backgrounds and with different points of view. *Id.* When these people who unknowingly see the world in different ways all come together in a community, apparently united in beliefs and values, there is an underground tension which could cause rifts. *Id.*

84. See Cornwell, *supra* note 4, at 123 (endorsing the belief that a person's internal self is composited on the criminal act in the manner of "subjective responsibility" or subjective guilt). Although the guilty state of mind is the object of the inquiry, it cannot be objectively seen as a fact. *Id.*

85. See U.S. CONST. amend. I; U.S. CONST. amend. V.

perspective teaches that the way we experience the world is subjective and “facts” are colored by an individual’s perceptions.⁸⁶ In addition, philosophers have long pondered narration in another dimension, the inherent subjectivity of words themselves.⁸⁷ These two concepts are intertwined: words are the ingredients of the stories that we tell ourselves in order to make sense of our daily experiences, and how we find meaning in the actions of ourselves and others.⁸⁸

The narrative of the crime exists in many forms: the story told by the accused; the story told by the victim. Arguably, the most, in fact the only, important story is the one constructed in the minds of the jurors.⁸⁹ The requirements imposed by the *Apprendi* decision⁹⁰ challenge the jury to determine the validity of the stories presented by the cast of characters involved in the trial.⁹¹ The fact finders must inquire into the beliefs of another through a process

86. See generally Scheppele, *supra* note 4.

87. See generally Cornwell, *supra* note 4. See also Linda A Cistone-Albers, *Deconstructionist and Pragmatic Analysis Reveal the “Intent to Discriminate” in Proposition 227 — A California Initiative*, 27 W. ST. U. L. REV. 215, 230 (1999-2000) (acknowledging that “[a] deconstructionist approach seeks to understand the sense or, in some cases, the non-sense of the words and their interplay.”).

88. See LUDWIG WITGENSTEIN, *LAST WRITINGS ON THE PHILOSOPHY OF PSYCHOLOGY: THE INNER AND THE OUTER 1949-1951* (G. H. von Wright & Heikki Nyman eds., Blackwell Publishers 1992). Wittgenstein, at the end of his life, recorded his reflections on the relationship between the inner and outer self, the interactions between one’s mental state and his outward behavior. *Id.* at x-xii (Editor’s Preface). This body of work was composed in small notebooks and were frequently unclear and abbreviated. *Id.* As such, the author will combine general ideas extracted from his text with quotations that obviate Wittgenstein’s intent throughout these endnotes. “Our concepts, judgments, reactions never appear in connection with just a single action, but rather with the whole swirl of human actions.” *Id.* at 56e. See also Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.—C.L. L. REV. 1, 4 (2001) (referring to the discourse theory of postmodern philosophy, developed by Jacques Derrida and Michel Foucault). The discourse theory assumes a world constructed by the language, concepts and ideas of humans as opposed to an objective “mirror” view of reality. *Id.*

89. Cornwell, *supra* note 4, at 108-09 (stating “[c]ritical questions about a defendant’s mental state at a particular moment in the forensic narrative, which seem like questions of fact to be verified in a scientific mode, are more properly seen as questions of value by which a ‘fact finder’ infuses meaning into the narrative”). See also Andrew e. Taslitz, *Gender and Race in Evidence Policy: What Feminism Has to Offer Evidence Law*, 28 SW. U.L. REV. 171, 210 (1999) (acknowledging that one is unable to understand an accused’s “mental state” without first understanding his sound group’s norms). Taslitz further points out that “if mental state is primarily a linguistic, interpretive phenomenon, then there is no mental state ‘out there’ to discover.” *Id.*

90. *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000).

91. See Irvin C. Rutter, *Law, Language, and Thinking Like a Lawyer*, 61 U. CIN. L. REV. 1303 (1993) (interesting discourse on the interplay between law, language, psychology and philosophy).

of analyzing the words that the parties recall and the stories that they have composed to make sense of the event.⁹² In this manner, the jury must form beliefs about beliefs, speculation upon speculation.⁹³ Upon this the “facts” rest.

Analogy can simplify complexity. In order to understand the theories presented, it behooves one to differentiate between causes and reasons.⁹⁴ Causes are likened to scientific or mathematical reasoning: if A and B, then C.⁹⁵ Reasons, on the other hand, are a much more human construct.⁹⁶ People can understand reasons as the subjective state of mind that leads a person to act in a certain manner.⁹⁷ Theoretically, anyone can determine causes without a grand measure of projecting a sense of one’s self into the problem at hand.⁹⁸ Reasons, conversely, are speculative and can be easily influenced by perceptual and semantic differences between the narrator and listener.⁹⁹

In this framework, the reason, hate, by which one affects the crime, is the subjective measure to avoid whenever possible.¹⁰⁰

92. See, e.g., Cornwell, *supra* note 4, at 109 (in judging a person, the jury comes to the problem with their own identity bases and must use their own individual senses of self to project onto the accused and victim that which makes sense according to a more personal construct); Wittgenstein acknowledges the difficulty of interpreting another’s motivations even when that person is trying to communicate that very idea. WITTGENSTEIN, *supra* note 88, at 28e. (“Consider that we not only fail to understand someone else when he hides his feelings, but frequently also when he does his utmost to make himself understood.”).

93. See Cornwell, *supra* note 4, at 123.

94. *Id.* at 110.

95. *Id.*

96. *Id.*

97. Cornwell describes this phenomenon as one which “is literary and provides meaning through image connotation;” “fram[es] conduct against common sensibilities and intuitive apperceptions;” “assumes a grammar of reasons by giving sense through familiarity;” and “accounts for human actions in terms of feelings and passions.” *Id.*

98. *Id.* at 113.

99. The relationship between cause and reason is like the relationship between the inner and outer self. See generally WITTGENSTEIN, *supra* note 88. Wittgenstein acknowledges the difficulty of another, let alone one’s self, being able to know the inner process of humans. *Id.* at 84e. He asserts that one cannot know something in the internal world or through reason as clearly as one can know a cause, such as a mathematical equation’s solution. *Id.* at 84e-8se. However, without asserting a type of knowledge regarding the inner self of others, human communication and life itself makes no sense. *Id.* For a discussion regarding the misleading nature of declaring facts or knowledge, see Cornwell, *supra* note 4, at 131-32 (explaining that claiming basic knowledge about ourselves and our world is a concept without which we could not exist; however, such an assertion is not always able to be empirically proven as factual).

100. Dillof, *supra* note 5, at 1017 (acknowledging that thoughts in and of themselves should never be punished). Dillof notes that the intent of bias crime legislation is not to punish thoughts per se, but to punish thoughts that

Surely, few philosophers would argue that the base crime, without the element of hate or bias, established by both the *actus reus* as well as the *mens rea*,¹⁰¹ can be measured solely in terms of “cause” as previously defined.¹⁰² The fact that criminal law requires the finding of a *mens rea* weaves reasoning intrinsically into the determination of fact.¹⁰³ But this primary level of determination is firmly entrenched in our legal system, and, in its generality, does not pose a serious threat.¹⁰⁴ The secondary reasoning, that of the determination of the “because of” statement, requires projection to be based on projection and subjectivity to be compounded.¹⁰⁵

It is difficult to require the jury to determine that at a particular moment bias alone drove a person to act.¹⁰⁶ This

underlie crimes. *Id.* The problem with this analysis is that the base crime has already been punished, and that the bias prerequisite to a bias crime adds additional punishment to the base crime. *Id.* In doing this, the law asserts that the bias crime is worse and should incur greater punishment. *Id.* Dillof asserts that both the bias-motivated criminal and the non-bias motivated criminal have the same level of culpability and thus should receive the same degree of punishment, for one person’s safety and well-being is no different than another’s. *Id.* at 1034.

It is a greater wrong to punch a person than a pillow because persons have a higher moral status than pillows. In contrast, as a general matter, all persons have an equal right to be free from physical harm and other sorts of wrongdoing; none may claim a superior status. Although there may be limited exceptions (saints, innocent children, etc.), exceptions should not be a function of race, color or religion. This claim follows from the principle of equality that as all are created equal, race, religion, and national origin are morally irrelevant. Accordingly, it is no greater (or lesser) wrongdoing to steal from a Black than a White and no greater (or lesser) wrongdoing to punch a Jew than a gentile.

Id. at 1034-35.

101. “The *actus reus* [“guilty act”] is the physical aspect of the crime, whereas the *mens rea* (guilty mind) involves the intent factor.” BLACK’S LAW DICTIONARY 36 (6th ed. 1990).

102. See generally Cornwell, *supra* note 4 (basing throughout his article an analysis of causes and reasons on the *mens rea* necessary for a criminal conviction).

103. Dillof, *supra* note 5, at 1017 (noting that the *mens rea* as a statement of intent is used to determine the appropriate sanctions).

104. See Dillof, *supra* note 5, at 1017 (acknowledging that the determination of an accused’s mental state is central to the determination of the *mens rea*, one element required in criminal law). Dillof recognizes that the *mens rea* targets the intent of the accused and the thoughts upon which the underlying act is based. *Id.* However, he astutely recognizes that the thought requirement for *mens rea* is very general, as opposed to the specific findings of beliefs and values central to bias crimes. *Id.* This type of finding, Dillof asserts, is not congruent with traditional *mens rea* analysis. *Id.*

105. See Candeub, *supra* note 61, at 2092 (“[O]ne cannot really be content that one is properly identifying those mental properties — in one’s own mind — which one is analogizing into another’s.”)

106. See Cornwell, *supra* note 4, at 149 (averring that one’s mental state is really not in existence as most assume). More precisely, it should be seen as “a conclusory label applied retrospectively to make sense of multiple streams

determination is as theoretically difficult as trying to accurately discern the meaning of a single statement without being able to consider the speaker, the context, the historical implications of that moment, or any other factor which we normally, albeit subconsciously, ponder.¹⁰⁷ The state of mind of any individual is an inner function that cannot be known to another.¹⁰⁸ To cope with this, we (including jurors) project our own internal constructs on the accused and interpret his words and his story through our own internal dictionary, defining the content in a way that fits within our personal story-telling methodology.¹⁰⁹

An understanding of the power and limitations of narration from both a philosophical and psychological perspective leads to the ultimate conclusion that one person's intent in the commission of a crime is difficult to ascertain.¹¹⁰ Requiring a jury of twelve individuals to find as facts the "because of" part of the equation, or the motivations and rationale for committing an act, is a theoretically impossible feat.¹¹¹ This is the realm of the reason; it is not one of fact.¹¹² It is a world of speculation and projection that

of consciousness." *Id.*

107. See WITTGENSTEIN, *supra* note 88, at 29e (pondering that even if one had the ability to listen to the thoughts of another, it would be so out of context that it could be compared to only being able to read one "sentence in the middle of a story"). Taslitz recalled a demonstration of Wittgenstein's which pointed out that "seeing' initially is often 'seeing as.'" Taslitz, *supra* note 89, at 193. He noted that we do not see items as objective truths. *Id.* Rather, the item is seen filtered through the viewers "interpretive framework." *Id.*

108. See generally Candeub, *supra* note 61, at 2079-81 (discussing the "Other Minds Problem" which shows that the results of trying to know another's mind or internal thought processes is intrinsically inaccurate).

109. See, e.g., Scheppele, *supra* note 4, at 2081 (promoting that an individual's understanding of justice is hinged on the assumptions, values and perceptions that he or she carries); see also Taslitz, *supra* note 89, at 210 (opining "mental state is a sound construct created by the defendant and the jury").

110. See Candeub, *supra* note 61, at 2082 (identifying that assessing the internal mental processes of another is beyond verifiable and according to some, meaningless).

111. See, e.g., *id.* at 2122 (concluding that hate crime legislation leads to arbitrary decisions because the basis of such decisions rests upon that which cannot be ascertained with certainty and threatens the punishment of thought). See also WITTGENSTEIN, *supra* note 88, at 88e ("The uncertainty about the inner is an uncertainty about something outer.").

112. See, e.g., Cornwell, *supra* note 4, at 109 (declaring that juries, through the projection of their own understanding of the world, translate even scientific "causes" into the subjective realm of "reasons." Justice, therefore, is a psychological concept because it is interwoven with a person's identity basis, giving the concept and intended result meaning); see also Rutter, *supra* note 91, at 1035 (noting that language has its own world, distinct from the world of behavior, which is the interactive world that nouns are made of: people, places and things).

is best left to thoughtful reflection. It should not be the basis for criminal indictments.¹¹³

III. PROPOSAL: KEY CHANGE

In the advent of *Apprendi*¹¹⁴, the scope of hate crime legislation must change. States must alter their laws to ensure that they keep with the required standard; a sentencing judge can no longer determine bias by a preponderance of the evidence.¹¹⁵ Hate now must be considered an element of the crime and determined by the fact finders beyond a reasonable doubt.¹¹⁶ Some might consider this to be a valiant decision, believing that it offers the accused more protection — a higher burden of proof.¹¹⁷ Consequently, the argument has been made that the United States Supreme Court's decision affirms the constitutional rights of those who stand accused.¹¹⁸ However, this analysis has its faults, and they lie in the areas of psychology and philosophy.

Narrative psychology, and the legal scholars who have embraced the power of narration in the courtroom, teaches us that the stories told in our legal forums are fraught with interpretive dilemmas.¹¹⁹ There is a high degree of subjectivity involved in

113. See generally Candeub, *supra* note 61; Cornwell, *supra* note 4; Scheppele, *supra* note 4.

114. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

115. *Id.* at 490.

116. *Id.*

117. See Richard J. Corry Jr., *Burn This Article: It is Evidence in Your Thought Crime Prosecution*, 4 TEX. REV. LAW & POL. 461, 485-86 (2000) (having examined the decision in *Apprendi*, Corry agrees with the Court's determination that the additional question of whether there was bias involved in the commission of a crime should become an element of the offense). He argues that the constitutional element involved requires the constitutional guarantee of a trial by jury. *Id.* Corry quotes the dissenting opinion from the ruling of *Apprendi* in the New Jersey Supreme Court.

The critical determination required by the statute, that a defendant's mental state in committing the subject offense encompassed a purpose to intimidate because of race, necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof. Moreover, the significantly increased sentencing range triggered by that statute also persuades me that the finding of a purpose to intimidate must be treated as a material element of the defendant's crimes, and that the material element must be found by a jury beyond a reasonable doubt.

Id. at 486 (quoting from *Apprendi v. N.J.*, 731 A.2d at 498). However, Corry further opines that although the jury trial is necessary, his belief lies in the fact that punishing bias actually serves to undermine one's protected constitutional rights. *Id.*

118. *Id.* at 485-86.

119. See, e.g., Scheppele, *supra* note 4, at 2085 (acknowledging that the manner in which a story is told in the courtroom can dramatically affect the outcome of the trial). See also Abrahamson, *supra* note 26, at 532 (stating "[t]he law is not rigid. An issue can be stated in many ways and the way the

attempting to construe these tales.¹²⁰ Philosophy adds to the picture by pointing out that the meaning of words are subjective, and different people understand the same story in different ways simply because of the intentions they attach to the words used.¹²¹ Most people recognize that certain attorneys' prime value lie in the way they tell a story in the courtroom and their ability to influence jurors.¹²² It is the stuff from which legal legends are born.

A jury of one's peers may not be the most objective determination of the truth beyond a reasonable doubt for the subjective element of the crime, the requisite bias.¹²³ Consequently, one must ponder alternatives. If "beyond a reasonable doubt" is actually an unreasonable standard for assessing bias, what is the solution? Furthermore, the notion of joining several people together to make a determination of bias exacerbates, rather than alleviates, the problem. One possible solution that comes to mind is returning to the analysis made by a judge during the sentencing phase.¹²⁴

Giving the judge the task of determining bias during the

issue is phrased often determines the answer").

120. See Finkel, *supra* note 65, at 774 (acknowledging that although the "facts" of a case have some bearing on the way the legal story is told, it is not in congruence with the way that most construe the inner workings of the justice system). Finkel concludes with the observation that "[i]n the final analysis, it is less the role played by the evidence in the natural event than the degree to which the evidence can be redefined and relocated within stories and about the event that determines the outcome of a case." *Id.* See also BROOKS, *supra* note 66, at 59. In interpreting Freud's comments on psychoanalysis, Brooks asserts that "narrative truth" is measured by the conviction of the storyteller and the logical flow and force of the story being told. *Id.*

121. See generally Cornwell, *supra* note 4.

122. See Rutter, *supra* note 91, at 1305 (noting that a supraliminal knowledge of the workings and structure of language can lead to a more effective and mastered performance by those practicing in the legal arts).

123. See, e.g., Cornwell, *supra* note 4, at 138-39 (proposing that the only issues that should be given to the jury to determine are those that are actually determinable as facts). Those issues that are not objective facts, such as volition in many circumstances, should be left to be decided by judges. *Id.*

124. *Id.* at 139-41. Cornwell advances the idea that judges are the best candidates to review any issue at trial that is not a purely factual inquiry. *Id.* at 139. However, Cornwell recommends a radical new criteria for the proper judicial body to make such interpretive inquiries. *Id.* at 140-41. He suggests that the proper background for a member of the judiciary is that of philosopher or poet, for they are accustomed to the world of language and metaphor that influence decisions based on the non-factual, and are equipped with the "classic virtues such as courage, justice, wisdom, and temperance." *Id.* at 141. But see Scott Phillips & Ryken Grattet, *Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law*, 34 L. & SOC'Y REV. 567, 569 (2000) (asserting that a variety of studies support the idea that judges are influenced by their own ideological stances and political views in their decision-making capacity).

sentencing period of the trial has inherent problems as well. First, the Supreme Court in *Apprendi* just ruled on this issue and found that this method of deciding punishment was unconstitutional and unacceptable.¹²⁵ Second, there is the issue of subjectivity. Judges are human and, despite their well-intentioned efforts, are burdened with the same biases with which the rest of the population struggles.¹²⁶ As our national community becomes more refined, there is greater importance placed on correcting social wrongs. This is admirable, and without a doubt, the correct path for our civilization to take. But this sense of a moral "right," along with social and political pressures, may influence judges to punish alleged bias based on persuasion rather than fact.¹²⁷

Crimes that are perpetrated by those who choose their victims because they belong to a protected class should be punished. All criminals should be punished. No one should be victimized. But all victims have the same moral standing.¹²⁸ All victims are members of the human race.¹²⁹ All victims are citizens of this nation and the states in which they reside. The punishment for a wrongdoing against one person should be the same as the punishment for a wrongdoing against another.¹³⁰ This is the manner in which we might truly embrace equality in our nation. All people are seen as equal under the laws and all receive equal protection from the laws. In a similar regard, all those accused can be assured of the fairest trial possible without the inherent biases and subjectivity involved in the analysis of the "because of" part of bias crime legislation.¹³¹

Arguably, all criminals act with hate in their hearts and disregard for the rights and welfare of their victims. That is why we punish criminals and those who do not abide by the laws. Although the proponents of hate crime legislation arrive at their vantage points from noble positions, hate crime legislation should not exist.¹³² Despite earnest social goals, the law must stand on the most solid constitutional ground possible.¹³³ When we see laws

125. *Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000).

126. See Phillips & Grattet, *supra* note 124, at 570.

127. See generally *id.*; Scheppele, *supra* note 4, at 2085.

128. See Dillof, *supra* note 5, at 1034-35.

129. *Id.*

130. See Anthony M. Dillof, *The Importance of Being Biased*, 98 MICH. L. REV. 1678, 1682 (2000) (opining that a person who commits a crime based on racial animus is morally no more responsible than one who commits the same offense without the racial motivation).

131. See Corry, *supra* note 117, at 488 (criticizing a bias crime being brought to a jury because of possible unjust results due to trial procedures).

132. *Id.* at 487 (asserting that the goal of hate crime legislation is to punish thoughts, but such legislation does not meet the goal of ending hatred).

133. See Phillips & Grattet, *supra* note 124, at 573-75 (delineating constitutional arguments against bias crime legislation).

that embrace highly subjective standards, we must do all that we can to objectify the analysis.¹³⁴ Although the United States Supreme Court may have been trying to meet this goal by increasing the burden of proof for enhancement statutes, it has fallen short of the mark. Hate crime legislation that makes the finding of bias an element of the crime increases, rather than decreases, the subjectivity involved in the analysis.¹³⁵ Those who perpetrate crimes against individuals belonging to a protected class should be punished in the same manner as those perpetrating against any other human being.¹³⁶ The base crime should be punished, not the additional element of bias. In this manner our society can promote a safe environment for all of its citizenry, send a message that anti-social behavior will not be tolerated, and continue to uphold a tradition of fairness in the judicial system.

IV. CONCLUSION

Hate and bias are not new phenomenon in our nation's history.¹³⁷ As we continue to attempt to correct past injustices and ensure a "more perfect Union"¹³⁸ for all of the inhabitants of the United States, we try to incorporate these values into our system of national jurisprudence. The recent tide of hate crime legislation is an attempt to meet these goals.¹³⁹ Because of the relative newness of this type of law, the Supreme Court has rendered several important rulings in the past decade on the subject, the most recent being found in *Apprendi*.¹⁴⁰ Although *Apprendi* focused on the narrow issue of sentencing enhancement statutes, it was framed in a "bias crime" perspective and has an impact on the manner in which states can punish criminals motivated by bias.¹⁴¹ Since *Apprendi*, states are required to frame their hate crime statutes in a manner that treats the bias as an element of the crime.¹⁴²

However, the need for the court or the fact finders to delve

134. See generally Cornwell, *supra* note 4.

135. See Corry, *supra* note 117, at 470 (noting that several suspect evidentiary issues are involved in analyzing hate crimes, including the necessity to try to determine the thoughts of another, the influence the media has over such cases and the impact of interest groups upon the media, as well as the possibility that the crime was fabricated for social or pecuniary gain).

136. See Dillof, *supra* note 130, at 1682.

137. See generally JENNINGS & BREWSTER, *supra* note 12.

138. U.S. CONST. pmb.

139. See generally Taslitz, *supra* note 26.

140. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993); *R.A.V. v. St. Paul, Minnesota*, 505 U.S. 377 (1992).

141. *Apprendi*, 530 U.S. at 475.

142. *Id.* at 2362-63.

into the human mind to determine the rationale behind the accused's actions has made this type of legislation suspect.¹⁴³ Narrative psychology teaches us that the "story" behind a person's actions is more complex than initially meets the eye.¹⁴⁴ The stories told are subjective, and the backgrounds of the jurors are influential in their interpretation of such stories.¹⁴⁵ Adding the lessons of philosophy to the picture, it is evident that words themselves are prone to different interpretations.¹⁴⁶ Moreover, the human reasons that motivate people are quite different from the more objective stance of "causes."¹⁴⁷

Adding all of these factors together, the trial of an accused for a bias based offense is prone to a more subjective analysis than other types of wrongs. The actions in the courtroom can be likened to an interpretive dance, and the audience members, the jurors, are charged with the task of finding the meaning of the piece beyond a reasonable doubt.¹⁴⁸ This is neither fair nor just. Our country should continue to find ways to combat indecencies against all people, but should do so with a strong backing of the rights guaranteed by the United States Constitution. The interpretive dance of hate crime legislation does not fit within the choreography of the Constitution. Despite the noble values that these legislative measures embrace, reverence must be paid to the higher values of the Constitution. The base crime should be punished. The mindset of the accused should not.

143. See Candeub, *supra* note 61, at 2116.

144. See Finkel, *supra* note 65, at 776 (promoting the idea that a real truth is non-existent and the construct of truth is really likened to that of a story).

145. *Id.* at 778 (explaining that jurors attempt to explain the information proposed at trial through interpretation which renders a story that they are able to comprehend).

146. WITTGENSTEIN, *supra* note 88, at 28e. See also Rutter, *supra* note 91, at 1328 (noting that "to the extent that one thinks in language, especially at the more abstract levels with no counterpart in directly sensed experience, the vagueness of language may be accompanied by vagueness in thinking").

147. See Cornwell, *supra* note 4, at 115-17.

148. See generally *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

